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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924. 1925

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF

MARY E. ERSKINE, DECEASED,
WILBUR ERSKINE,

Petitioners,

vs.

HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,

Respondent.

No. 730 199

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners,

vs.

HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,

Respondent.

No. 720

A writ of certiorari will issue from the Supreme Court only where questions of gravity or importance or great public concern are involved. It will issue where questions of international importance are involved; where there is a difference of opinion between different Circuits of Appeal; where there is a conflict as to large property rights between the decisions of a Circuit Court of Appeals and a State Supreme Court in the same circuit; and where there is a question as to the disqualification of a judge of the Circuit Court of Appeals to sit in the case. The honorable judges of this court know far better than the authors of this brief the type and class of cases which they will bring before them by certiorari. Needless to say, it is only a case of the most extreme importance which will be considered by the Supreme Court of the United States on writs of certiorari to the Circuit Court of Appeals, especially in cases where the Circuit Court of Appeals is made the court of last resort.

May we first call the court's attention to the fact that this petition for writ of certiorari was filed November 10, 1924; that the opinion of the United States Circuit Court of Appeals in this case was handed down on June 20, 1924. On August 8, 1924, the petitioners filed in the Circuit Court of Appeals a petition for rehearing, and on August 15, a journal entry was made by the order of the Circuit Court of Appeals as follows:

"It is ordered by the Court that the petition for rehearing in this cause be, and the same is hereby denied."

We wish for this court to note that the petition for writ of certiorari was not filed within three months of the order of the Circuit Court of Appeals which reversed and remanded the order of the District Court. We are well aware of the rule and decisions which interpret that rule, to the effect that in case of a petition for rehearing in a State Supreme Court and a subsequent petition to the United States Supreme Court for a writ of certiorari, that the time will date from the order denying the petition for rehearing. Furthermore, we are aware of the rulings that if the petition for rehearing in the Circuit Court of Appeals is filed and "*entertained*" by that Court, the time for filing a petition for writ of certiorari dates from the denial of the petition for rehearing. We urge, however, that in the case at bar the Circuit Court of Appeals did not "*entertain*" the petition for rehearing made by the petitioners herein.

Again it may be noted that the petition for rehearing was filed on the 8th day of August and it was up to the Circuit Court of Appeals to dispose of that petition in some manner. Without waiting for briefs to be filed in opposition thereto, and as we contend, without "*entertaining*" this petition, it was denied by an order as heretofore quoted.

There is nothing in the record to show anything except the filing and denial of the motion. "Entertainment" should certainly include some serious consideration, or at least, that as to the matter raised in the motion which was an error in Law, there had been no argument on that particular point.

Simkins Federal Practice, 879.

It is maintained here that the petitioner had a choice of procedure and availed himself of the petition for rehearing. This was denied in ample time to have taken advantage of his other rights had he then cared to do so.

Bondholders vs. Toledo D. & B. R. Co., 62 Fed. 166.

It is believed that if the petition for rehearing in every essential is not brought within the rules under which such petitions may be granted, the action by the court in denying such petition without any further showing may not be an "entertainment" of the petition.

May it also be noted that the petitioners herein had ample time to file their petition for a writ of certiorari after the denial of their petition for rehearing and within the three month period as prescribed by the Statutes (Sec. 6 Act of Sept. 6, 1916) ; that in other words if our position is well taken, a petition for writ of certiorari should have been filed on or before September 20, 1924, and these petitioners had from August 15, to September 20 in which to do this, and having failed we suggest to this Honorable Court that it has no jurisdiction of this cause by virtue of the Statute cited above.

This court is not asked to review the order denying the petition for rehearing, but to review the original order which was final when entered. The analogy to a motion for a new trial, which has been made, is not borne out in the case at bar, for in such a case the appeal or review is taken from the action of the court overruling the motion for a new trial.

Steines vs. Franklin Co., 14 Wall. 15.
Railway Co. vs. Heck, 102 U. S. 120.
Central Trust Co. vs. Grant Loc. Wks., 135 U. S. 207.

It is now urged that unless this court enlarges the meaning of the Statute which permits a writ of certiorari to issue if the petition is filed within three months "*after entry of the judgment or order*" that petitioners are here seeking such writ too late.

The petitioners have attempted to suggest to this court that there is a conflict between various Circuit Courts of Appeal upon the question involved, and also that there is a conflict between the Circuit Court of Appeals and the Court of last resort in the State of Indiana. We contravert both of these suggestions.

The laws on the subject of dower and the interest of a widow in the real estate of her husband applying in the various states are many and varied.

The Courts have held time and time again that in order for the bankruptcy law to be of uniform operation throughout the United States does not mean that laws of exemption, laws relating to dower and the interest of the widow or wife in her husband's property, as enacted by the various states, shall be the same or applied in the same manner by the bankruptcy court. In other words, the bankruptcy act is of uniform operation throughout the United States even though the bankruptcy courts follow the laws of the several states in certain particular instances, such as those relating to liens, exemption and dower. Therefore, the opinion and decision of the Circuit Court of Appeals of the judicial circuit in which the State of Indiana is located is the only Court of Appeals which can determine and pass upon the question involving the interest of a wife or widow in her husband's real estate in Indiana, and any opinion or decision of any other Circuit Court of Appeals can not be in conflict with the opinion or decision of the Circuit Court of Appeals for the circuit in which the State of Indiana is located, because the construction of the statutes of the State of Indiana would not be involved.

On the other proposition, that is, that there is a conflict between the court of last resort in the State of Indiana and the Circuit Court of Appeals of the judicial district in which the State of Indiana is located, this Honorable Court's attention is called to the fact first, that the case cited by petitioners is not a decision by the Supreme Court of the State of Indiana, and that the Appellate Court of the State of Indiana is not a court of last resort in that State; and in the second place, it is suggested that the petitioners themselves in their brief to the Circuit Court of Appeals

(and the Circuit Court of Appeals as shown by their opinion relied upon the brief) stated that this particular decision of the Indiana Appellate Court and the questions therein involved did not apply to the case at bar. This case cited by petitioners, *Hardin, Guardian vs. American Trust Company*, 67 Ind. App. 213, involved the construction of the Judicial Sales Act of 1875. May we quote from petitioners' (respondents below) original brief in this cause, especially on page 6,

> "The general statutes of descent which fix the wife's inchoate interest are found in Sections 2864, 3014, 3027, 3029 R. S. Indiana, 1914. Sections 3052, 3053, and 3054, which are the sections referred to by petitioner, constitute *the Judicial Sales Act of 1875* and *relate to a special subject and to meet a special situation distinguished from the question in the present case.*
>
> "Respondent's position is that whatever title the Trustee in Bankruptcy took became vested by operation of law (not as by judicial sale) as of the date of the adjudication in Bankruptcy. That at the same time the wife's inchoate interest by operation of law became vested. That thereafter the Trustee of the bankrupt and the bankrupt's wife were the same as tenants in common, each holding their respective rights. That either could have instituted a suit for partition or could have conveyed their respective undivided shares, so far as the lawful rights of either were concerned.
>
> "The petitioner does not state the position of the respondent. *There is not now and never has been any claim by the respondent either before the Referee or the District Court that the respondent's decedent took any title as by judicial sale or under the special judicial sale Act of '75.*
>
> "*The respondent herein does not claim, as asserted in petitioner's brief, that his decedent took her title to one-fifth of said real estate by virtue of the judicial sales act of 1875, the same being an act designed to effect strict judicial sales.* Acts 1875, p. 178, Burns' R. S. 1914, Sections 3052-3055.

"Respondent affirms, on the contrary, that the rights and interests of his decedent in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the State of Indiana, being Sections 2964, 3014, 3029 and 3037, Burns' R. S. 1914."

Furthermore the respondents say on page 12 of their original brief:

Accordingly we submit that the Judicial Sales Act of 1875, does not apply to the instant case."

The Circuit Court of Appeals may be quoted in this regard as follows:

"Respondent Taylor, Trustee, repudiates the suggestion of the petitioners that he claims any title under the Indiana Judicial Sales Act of 1875." (Section 3052 and 3055, page 178 Burns 1914).

Any fault which the petitioners may be able to find with the opinion of the Court below in this regard is their own and cannot be laid upon the Circuit Court of Appeals; and the petitioners should not now in this court be allowed to claim any rights which they have heretofore expressly repudiated and refused.

The petitioners have gone into the merits of this case in their petition, and therefore we wish briefly to answer the points made by them.

In the first place, the interest of a wife in her husband's real estate, is conditional, depending upon her survivorship.

Fry vs. Hare, 166 Ind. 415, 420.

There is an exception though, and that is in cases of Judicial Sales, and then the Act of 1875 (Sec. 3052, 3053, 3054 and 3055 of Burns' Revised Statutes of 1914) applies.

Chase vs. Van Meter, 140 Ind. 321.
Wright vs. Gelvin, 85 Ind. 128.
Lawson vs. DeBolt, 78 Ind. 563, 564.

The second section of the Judicial Sales Act of 1875 shows reason for the respondents' willingness to repudiate any claim under this act, because that section provides that the provisions of this act shall not apply to sale of real prop-

erty of the value of $20,000 and over. And the respondents elected to claim an interest in real property over the value of $20,000.

The Judicial Sales Act (Act of 1875) is a very practical law. Prior to it, the purchaser at a sale of a husband's interest purchased that interest together with a possibility of a greater interest—that greater interest ripening upon the husband's survivorship of his wife—and for which additional possible interest he actually gave no consideration. The husband's interest would bring as much without this possible increase as with it. The setting apart under the Judicial Sales Act the wife's interest gave that interest a real value. "The evident purpose of the act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in the case of Judicial Sales."

Davis vs. Kelly, 179 Ind. 13, 97 N. E. 336.

In the case of *Lawson vs. DeBolt*, 78 Ind. 563, the husband made a voluntary assignment and the assignee sold the debtor's real estate. The court said in that case that "The sale by the assignee and confirmed by the court, was a judicial sale." The court did not say that the *assignment* by the debtor was a judicial sale.

And the same is true in the cases of bankruptcy prior to the Act of 1898. Those cases decide that the adjudication in bankruptcy together with the transfer or conveyance by the register in bankruptcy to the assignee in bankruptcy was a judicial sale. Those cases did not hold that the adjudication itself was a judicial sale.

Roberts vs. Shroyer, 68 Ind. 64.
Mattill vs. Bass, 89 Ind. 220.

The only way in which a bankrupt's wife's inchoate interest may be hastened is by a judicial sale. We urge that there could be no judicial sale until the actual trustee's sale by order of the bankruptcy court, at which time the bankrupt's wife would be entitled to have her inchoate interest set off.

In some jurisdictions, and in Indiana, but for the Judicial Sales Act, it is possible for the Trustee in Bankruptcy to sell the real estate of the bankrupt subject to the wife's

interest, or it is possible to set apart to the wife, the interest in the lands of her husband to which she would be entitled by virtue of the laws of the state, which vest an interest in the wife when said lands are sold at judicial sales and create an unconditional title to the purchaser as to the remainder.

It has been held that the inchoate right of dower is unimpaired, and the Trustee in Bankruptcy takes the property of the bankrupt subject to the right of the widow to dower becoming consummate through the bankrupt's death.

Kelley vs. Miner, 252 Fed. 115.

Thomas vs. Woods, 173 Fed. 585, 19 Ann. Cas. 1080.

In re Slack, 111 Fed. 523, 7 A. B. R. 121.

In re Acretelli, 173 Fed. 121, 21 A. B. R. 537.

If such inchoate interest of the wife can never become consummate because of the wife's death prior to the death of the husband, it seems that the Trustee in Bankruptcy should be able to convey an absolute title to all the real estate of the bankrupt, just as the bankrupt himself before bankruptcy could have done in case the wife had not joined in the conveyance and subsequently died before his death.

Ohio Farmers Insurance Co. vs. Bevis, 18 Ind. App. 17.

Therefore, it is urged that the Trustee in Bankruptcy is entitled to the proceeds of the sale of such real estate and that on the merits of the case petitioners, if granted a writ of certiorari, cannot secure a reversal.

In the petitioners' brief emphasis has been laid upon the proposition that the respondent's original petition to review and revise to the Circuit Court of Appeals, should have been dismissed, inasmuch as respondent herein failed to follow the proper appellate procedure. Although the court below found that the proper procedure was not followed, respondent here does not concede that point and only refrains from arguing it here because it believes it is not proper at this time. If counsel for respondent did misconceive the proper appellate procedure, it is now urged that this Honorable Court follow the opinion of the Circuit Court of Appeals below, that Congress, by the Act of September 6, 1916, at Section 4 thereof (39 Stat. L. 727) attempted to remedy such mistakes.

It is urged that the Circuit Court of Appeals properly construed said section which is as follows:

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out. But when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed. (Sec 4 of the Act of September 6, 1916, 39 Stat. L. 727, Sec. 1549a, U. S. Comp. Stats. 1916)." ,

In the case of *Solu vs. Scintron and Aboy*, 237 Fed. 61, this section was construed and the court said, "In a case where the only difference between the two modes of seeking review is formal and where none of the substantial reasons for distinction between writs of error and appeals exist, we may properly disregard the objection. We will therefore proceed to consider the case on the merits."

The term "petition to review and revise" if added to the above quotation would only carry out the apparent legislative intent.

"This section does not abolish the distinction between writs of error and appeals but only requires that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review."

> *Gauzon vs. Compania General, etc.*, (1917) 245 U. S. 86, 38 S. Ct. 46.

In a petition to review and revise, only questions of law may be determined or brought before the Appellate Court. The respondent herein sought by his petition to review and revise nothing additional than a decision of a legal question. If he had proceeded by an appeal or writ of error to the Circuit Court of Appeals, rather than by a petition to review and revise, the question would have been one of law just the same, as nothing else is involved in this case. The matter was before the court on an agreed statement of facts and the entire record was before the court.

In the case cited by petitioners, *In re Loving*, 224 U. S. 183, 56 Law Ed. 725, which was decided in 1912, and prior to the enactment of the section herein involved, the court said in its opinion that the object of Section 24b of the Bankruptcy Act of 1898 is to give a review as to matters of law where facts are not in controversy. Such was the situation in the case at bar.

Furthermore the Supreme Court has held in construing Section 4 of the Act of September 6, 1916, that the purpose of said act was to discourage the necessity for abundant caution and to secure economy in the time of the courts and in making up and printing records. Mr. Chief Justice Taft said in the case of *In Essgee Co. vs. U. S.*, (1923), 262 U. S. 151, 43 S. Ct. 154, "Since the passage of the Act of September 6, 1916, which provides that no court having power to review a judgment or decree passed by another court shall dismiss an appeal because a writ should have been sued out, but that when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper Appellate procedure had been followed. The distinction is not important from the standpoint of the jurisdiction of this court. In the interest, however, of orderly procedure economy in time of both courts and in the making up and printing of the record, counsel should make every effort to select the proper procedure in review and not duplicate methods, out of abundant caution which the Act of 1916 makes unnecessary."

This section has been repeatedly upheld and in that regard may we cite the following cases:

Sucesores de Pyres Hermanos vs. Costa, (1922), 281 Fed. 439.

Swiftwater Plantations Co. vs. Davis, (1923), 287 Fed. 813.

Toyotisen Kaisha vs. Hartmann, (1918), 253 Fed. 422.

Cutting vs. Van Fleet, (1918), 252 Fed. 100.

Howard vs. Leete, (1919), 257 Fed. 918, 922.

Wilson vs. Union Tool Co., (1920), 265 Fed. 669.

The distinction between the various modes of appellate procedure are not abolished by this section, and the rights which an appellant would have under the proper procedure are given him although the procedure itself was improper.

Ana Maria Sugar Co. vs. Quinones, (1920), 253 U. S. 247, 41 S. Ct. 110.

Section 1 of the Act of February 13, 1911, Chap. 47 (36 Stat. L. 901) provides for printed transcripts in cases of appeals or writs of error, although the act referred to mentions only reviews by writ or error or appeal, *petitions to review under section 24b* of the Bankruptcy Act of 1898 are held to be the equivalent of an appeal for the purposes of this statute.

In re Burr Mfg. Co., 215 Fed. 898, 132 C. C. A. 238.

In construing the words "petition to review and revise" to be included within the terms "writ of error" or "appeal" in one case, a precedent has been set for such a construction of the act now in question.

The Circuit Court of Appeals in the case at bar included the term "petition to review and revise" within the meaning of the terms "writ of error" or "appeal", and it is respectfully urged that it did so properly.

The court's attention is called to other provisions of the United States laws. The first is the Act of September 24, 1789, 1 Stat. L. 91:

"No summons, writ, declaration, return, process, judgment, *or other proceedings in civil causes*, in any court of the United States, shall be abated, arrested, quashed, or reversed *for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect*, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The second is the Act of February 26, 1919, Chap. 48, 40 Stat. L. 1181, which is an amendment to Section 269 of the Act of March 3, 1911. This section shows the trend of Congress in regard to provisions providing against jeofails. This act reads as follows:

"All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The Act of September 24, 1789, Section 4 of the Act of September 6, 1916, and the Act of February 26, 1919, read together show the decided attitude of Congress toward technicalities in the courts and these statutes show the legislative intention to alleviate in all ways possible the effects of misconceived remedies and technical errors. These sections show, also, that Congress expects the Federal Courts to give substantial justice in every case, and not render decisions which will penalize litigants for technical mistakes made by their counsel.

The bankruptcy texts cite scores of cases where in order to be safe, litigants have sought a review in the Circuit Court of Appeals by appeal and also petitions to review and revise, and many instances are given where the courts indicated that they were in doubt as to which was the proper remedy. On numerous occasions the courts have properly passed upon the merits of the case before them without any question although the method of obtaining jurisdiction for the review is clearly wrong as they have done in

In re Hersey, 1 Fed. 2nd p. 5. (Advance Sheets, Nov. 13, 1924).

which has just come to respondent's attention.

Congress has always sought to obviate the miscarriage of justice to unfortunate litigants who have misconceived their method of seeking a review. Any one of the three Acts of Congress set out in this brief can, if broadly con-

strued, amply justify the decision of the court below. For the convenience of this Honorable Court we set out the opinion of the Circuit Court of Appeals sought to be reviewed here by the writ prayed for. There is no argument which can be made by counsel which may sustain it which is equal to the arguments set out in the opinion itself.

Before Alschuler, Evans and Page, Circuit Judges.

Opinion of Page, Cir. J.

Wilbur Erskine, on December 20, 1921, when adjudicated a bankrupt, was a resident of the state of Indiana, and was married to his first wife, who died March 21, 1922, survived by her husband and two children.

Before the filing of the petition and adjudication, bankrupt owned, in fee simple, a considerable amount of real estate. His wife left a last will and testament, naming respondent Taylor trustee thereunder. Petitioner Voss was elected trustee of the bankrupt estate.

After the death of the wife, who had never joined in any conveyance, the real estate was sold, by stipulation between petitioner, respondent and bankrupt, all parties joining in the deeds.

The rights of respondent, as trustee under the will, were, by agreement of all of the parties, submitted to the court in bankruptcy, and its holding was favorable to the claim of respondent and bankrupt that, upon the filing of the petition and the adjudication in bankruptcy, the wife became vested with the same rights in the estate of the bankrupt that she would have had thereunder had she survived her husband.

This case is brought here by petition to review and revise, and a motion is made to dismiss on the ground that the case should have been brought here by appeal.

In support of his contention that this case is properly before this court on a petition to review and revise, petitioner's main reliance is upon *Coder vs. Arts*, 213 U. S. 223. Because of the difference between the facts in that case and the case at bar, it is inapplicable here to support petitioner's contention, in that case, a creditor filed his claim, and it was allowed in bankruptcy. In connection therewith, and

as a part thereof, he asked for priority, and the court held that the claim for priority was merely incident to the allowance of the claim. In the case at bar, respondent is not a creditor and is not seeking the allowance of a claim, as such. The same thing that respondent and bankrupt are seeking to do is to have carved out and set aside to them, as their property, free from administration in bankruptcy, a very considerable portion of the property which would otherwise be administered in bankruptcy and distributed to creditors.

This court in *re Breyer Printing Co.*, 216 Fed. 878, pointed out so clearly the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings" that it will serve no good purpose to add to what was there said. We there also discussed *Coder vs. Arts, supra*, and other leading cases wherein there is pointed out the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings."

> It seems clear, under the facts in the instant case, that "between the *trustee representing the bankrupt and his general creditors, as such, on the one hand, and ading property in the possession of the *trustee* to be litigated in appropriate plenary suits, and not affectverse claimants" (respondents) "on the other, concerning directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors."
>
> This is the language in *re Breyer Printing Co., supra.*

Counsel for petitioner rely upon *In re Petronio*, 220 Fed. 269, in which we held that the proceeding in the district court was of a summary nature, citing *In re Goldstein*, 216 Fed. 887, 889, and *In re Breyer Printing Co., supra.* In the Goldstein Case, after distinguishing between summary and plenary methods of proceedure, we said:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable.* A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the Dis-

trict Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

That was a petition to review and revise, which raised only the question of the jurisdiction of the court to enter any order other than one of dismissal, after it was ascertained that there was a claim to property that was not merely colorable. The Petronio Case is of like character. There the District Court, in the face of the fact that its jurisdiction was disputed, and the further fact that a substantial and not a colorable claim was set up, proceeded to adjudicate the matter in a summary way, and therefore, both the Petronio and Goldstein Cases were reviews of summary orders in bankruptcy.

The other authorities cited by petitioner are in harmony with the authorities here cited.

The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the parties can not affect the method of procedure to procure a review.

For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an act of September 6, 1916 (39 U. S. Stats. at L. p. 727; Sec. 1649a U. S. Compiled Stats. 1916):

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in

bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, supra, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with the appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms "appeal" and "writ of error" should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, especially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal.

Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana judicial sales act of 1875 (Secs. 3052 and 3055, page 178, Burns, 1914), but asserts,

> "That the rights and interests of his decedent" (Mary E. Erskine) "in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the state of Indiana, being Sections 3014, 3029, 3037 and 2864, Burns' 1914," (being, respectively, Secs. 17, 27 and 35 of Act of 1852, regulating descents, and Sec. 122 of the Decedents' Estates Act of 1881, for the settlement and distribution of estates).*

What respondent's argument means by a vesting upon adjudication by operation of law seems to be based upon three things: (a) That under Section 75 a (5) of the Bankruptcy Act, the inchoate right of dower of the wife does not pass to the trustee; (b) That upon adjudication "So far as the bankrupt's property was concerned, after the adjudication, he was, as it were, *civiliter mortuus*. His rights in the property were the same as though he were dead."; (c) That, by reason of *a* and *b*, there was vested absolutely in the constructive widow all of the rights that she would have had as

(a) May be conceded.

In *Bank vs. Sherman and Hickling vs. Sherman*, 101 U. S. 403, relied upon in support of proposition *b*, dower rights were not involved, but the court, commencing upon the effect of filing petition in bankruptcy, said:

> "The filing of the petition was a *caveat to* all the world. ** Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. ** If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus*."

We think that what was said *in re Dayton Coal & Iron Co.*, 291 Fed. 390, as to a part of the above quotations is reasonably applicable to all of it. The statement, "The bankrupt became, as it were, for many purposes, *civiliter mortuus*," we think is said more as an illustration than as a judicial determination, and certainly should not be held to have any influence on the determination of the issue in this case. In *Platner vs. Sherwood*, 6 Johnson's Chancery Reports (N. Y.) 118, 123, it is said:

> "But the *civil death* spoken of in the books, is of two kinds: 1. Where there is a total extinction of the civil rights and relations of the party, so that he can neither *take* nor *hold* property, and his heirs succeed to his estate in the same manner as if he were really dead, or the estate is forfeited to the crown; 2. Where there is an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate to the crown. Of the first kind, are the cases of monks professed, and abjuration of the realm; all the other cases are of the second kind. Strictly speaking there are but *two* cases of civil death; those of a *monk professed*, and an abjuration of the realm."

The bankrupt here was not in either class. One against whom a petition in bankruptcy has been filed, and against whom adjudication has been had, is not under any disability of any kind or character, except that his right to deal with the property owned at the time of the filing of the petition is in some ways restricted. He is under no civil disability

whatever. Even as to his property that passes to the trustee by operation of law upon adjudication as of the time of filing the petition he still may deal with it in certain ways. He has the power either before or after adjudication to contract with his creditors for a composition, (*Nassau Smelting & Refining Works vs. Brightwood Bronze Foundry Co.*, —— U. S. —— (opinion filed May 26, 1924), and such dealing is a matter of common and almost daily practice. In all cases, upon confirmation of composition, either before or after adjudication, the property that passes by operation of law to his trustee, again, by operation of law, passes from the trustee to him. (Sec. 70f Bankruptcy Act.) In most states, a bankrupt has exemptions, sometimes returnable to him in personal property, sometimes out of the real estate as a homestead. If a bankrupt is in any sense *civiliter mortuus*, he is not so in any such sense as would contribute or give effect to any section of the Indiana statute cited. Counsel say that cases construing Section 70a have uniformly held that the title of the trustee vests as of the date of adjudication, and that the wife's inchoate interests vest in her at the same time. No cases are cited. A wife's inchoate rights vest upon marriage or when the property is acquired after marriage. Unless there is some provision of some Indiana statute that operates to change the widow's inchoate right and increase it to a present fixed right, upon adjudication against the husband in bankruptcy, then there is not at the time of the vesting of the husband's estate in the trustee any change whatever in the wife's rights. The purpose of Section 70a is not to affect or change the wife's interest. Quite the contrary is true. It simply leaves a wife's interest where it finds it. In *Porter vs. Lazear*, 109 U. S. 84, 86, the court cites English authorities, and says:

> "By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him."

In *Davis vs. Kelly*, decided by the Supreme Court of Indiana, February 2, 1912, and reported in 97 N. E. at page 336, discussing Section 3062 Burns Ann. Statute, a section of the judicial sales act of 1875, said (p. 337):

"A proper construction of the act of 1875, as applied to the facts of the present case, requires the determination of the law prior to its passage. Under the statutes of 1852, a wife's inchoate interest in the real estate of her husband might become absolute in two ways: (1) Where a husband dies seized of real estate, the widow took by descent, as her husband's heir, under section 17 of the statute of descents, being section 2483 R. S. 1881. (Sec. 3014, Burns, 1908). (2) Where the husband's title was divested during coverture the wife not joining in any conveyance, the wife took, upon surviving her husband, not by descent, but by virtue of her marital rights, under section 27 of the statute of descents, being section 3029 Burns 1908 (Section 2491, R. S. 1881). * * *

"It is evident that, when a husband's land was sold at judicial sale prior to the taking effect of said act of 1875, and the husband subsequently died, leaving his wife surviving him, the wife took title in fee simple, not by descent, but by virtue of her marital rights under said section 27" (Section 3029 Burns). "* * Prior to that time, where a husband's land was sold at judicial sale, the inchoate interest of the wife did not become absolute until the husband died, leaving the wife surviving him. During the husband's lifetime the entire title, together with the right of possession, was vested in the purhcaser at the judicial sale. If the wife died during the husband's lifetime, her inchoate right was defeated altogether, and the title of the purchaser at the judicial sale became absolute. The purpose of the act of 1875 was to alter these rules of law by providing that the wife's interest should become absolute without reference to her survivorship of her husband. (Citing cases). The evident purpose of said act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in cases of judicial sales. To this extent and for this purpose the previous law was changed.

* * As the inchoate interest of the wife in the land of her husband in the conveyance of which she did not join vested in her and became absolute on the death

of her husband prior to the taking effect of said act of 1875, under said section 27 of the statute of descents * it follows that under said act of 1875 the inchoate interest of the wife in her husband's land sold at judicial sale vests and becomes absolute under said section 27, supra, upon the consummation of such sale."

It seems clear from this decision that in so far as the Indiana statutes are here involved, the Indiana law, except as changed by the act of 1875, under which respondent here is claiming no rights, is exactly as it was prior to said act. Sections 27 and 17, referred to in the above case, are Sections 3029 and 3014 Burns, respectively, here relied on by respondent. Section 27 has reference to the rights of a "surviving wife." Section 17 disposes of the interests of the wife "if a husband die testate or intestate." There is nothing in any of the four sections, 3037, 3029, 3014 or 2864, that in the remotest degree discloses any intent on any account to hasten or advance the time when the inchoate rights of the wife shall become absolute.

A very diligent search of the Indiana authorities has failed to reveal to us any case in which the courts of Indiana have held that the wife's inchate interest has been advanced so as to become absolute prior to the husband's death, unless such cases have been based and bottomed upon the act of 1875. *Lawson vs. DeBolt*, 78 Ind. 563; *Wright vs. Gelvin*, 85 Ind. 128; *Chase vs. Van Meter*, 140 Ind. 321. And the same search has revealed to us many cases in which the Supreme Court of Indiana has held that the interest of the wife is conditional, depending upon her survivorship. *Fry vs. Hare*, 166 Ind. 415, 420.

We are of opinion that on the death of the widow all her right in this property was extinguished, and that no interest in the property passed to Taylor, her trustee.

The order of the District Court should be, and it hereby is, reversed, and the cause remanded for further proceedings in conformity herewith.

In conclusion may respondent say that the petitioners' have cited no authority upon which they base their right to a writ of certiorari, and in the brief space of time which he has had to prepare this reply, respondent's counsel has searched the decisions of the Supreme Court as carefully as possible and has not been able to find a single case where procedure or practice only was involved which was brought before the United States Supreme Court on writ of certiorari to the Circuit Court of Appeals. All of the cases examined, in which the Supreme Court issued a writ of certiorari, were cases of a great importance and where the merits involved were such that the Supreme Court thought that substantial justice could only be done by the issuance of the writ.

The case at bar involves a comparaticely small sum of money, is of no great importance, involves merely the construction of the statutes in Indiana relating to the inchoate interest of a wife, and is not in any respect a proper one to be brought before the United States Supreme Court on a writ of certiorari from a court whose judgment is final.

The petitioners say in their brief that one of the reasons relied upon by them for the allowance of the writ is that Section 4 of the Act of September 6, 1916, is only intended to be corrective as to mistakes made in the procedures named under the judicial code, and that said section cannot by implication or judicial construction be applied to proceedings under the bankruptcy act. Possibly the petitioners have overlooked the fact that the section of the statute upon which they rely for a granting of the writ prayed for is section 3 of the Act of September 6, 1916, and they are now claiming section 4 of the same act cannot be availed of by respondent in the same proceeding.

Section 3 of the Act of September 6, 1916, amends section 4 of "an act to amend an act entitled " 'an act to codify, revise and amend the laws relating to the judiciary' approved March 3, 1911", approved January 28, 1915, and provides that judgments and decrees of the Circuit Court of Appeals in all proceedings and causes arising under "an act to establish a uniform system of bankruptcy throughout the United States', Approved July 1, 1898, and that all controvercies arising in such proceedings and causes shall be final

save only that it shall be competent for the Supreme Court to require by certiorari, that the proceeding, case or controversy be certified to it for review and determination.

That section specifically refers to the bankruptcy act of 1898 and specifically amends the act of January 28, 1915, which also referred specially to the bankruptcy act.

Then as to section 4 of the Act of September 6, 1916, we believe inasmuch as both sections were passed at the same time and part of the same act, that section 3 mentioning the bankruptcy act that it may be implied and construed that section 4 of the act was passed to meet the same situation and to further the same purpose as the preceeding section, and that therefore the Circuit Court of Appeals was not in error in construing said section to apply to proceedings under the bankruptcy act.

We respectfully submit this brief in opposition to the petition for writ of certiorari and pray that said writ be denied.

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